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IN THE

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# Supreme Court of the United States

October Term, 1940

No. 407 ✓

MONTGOMERY WARD & CO., INCORPORATED,

Petitioner,

vs.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION, UNITED STATES DEPARTMENT OF LABOR.


Respondent.

PETITION FOR WRIT OF HABEAS CORPUS TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT AND  
BRIEF IN SUPPORT THEREOF.

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vs.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR  
DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SEVENTH  
CIRCUIT.**

*To the Honorable the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

The petitioner, Montgomery Ward & Co., Incorporated, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on July 17, 1940, affirming a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, dated December 13, 1939.

### Summary Statement of the Matter Involved

The petitioner, as an employer of labor engaged in the business of selling general merchandise through mail order houses and retail stores (R. 4, 47), refused to obey a subpoena *duces tecum* of the Administrator of the Wage and Hour Division of the United States Department of Labor calling for the production of personnel records containing information as to the hours of labor and wages of some 2,000 employees of the petitioner's Kansas City, Missouri, mail order house (R. 43, 172). The refusal was conditioned by an expressed willingness to permit inspection of, or to produce, all records relating to any employee or class of employee as to which the Wage and Hour Administrator had reasonable cause to suspect that a violation of the Fair Labor Standards Act of 1938 (Footnote 1) might have occurred (R. 72-73, 82-83, 103-104).

The Administrator issued the subpoena not in aid of any quasi-legislative, fact-finding, or rule-making power, nor in aid of any quasi-judicial proceeding, but sought it solely as a law-enforcement officer engaged in policing the Fair Labor Standards Act (R. 3). The Administrator did not profess to be investigating an entire industry, but was suspicious of the petitioner as a single employer of labor (R. 4).

The subpoena *duces tecum* was not directed solely at records required by law to be kept, but included records not covered by the requirements of the Act or the regulations thereunder (R. 43, 25-27). The subpoena was not directed solely to records of hours and wages of employees engaged in interstate commerce or covered by the statute, but included records pertaining to many employees engaged solely in local, intrastate activities or

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Footnote 1: 52 Stat. 1060, 29 U. S. C. 201, et seq.



activities specifically exempted from the coverage of the Act (R. 43, 172-173). The subpoena was directed to records kept and used by the petitioner in the normal course of its business as a retailer of general merchandise (R. 175-176).

Upon the petitioner's refusal to obey the subpoena *duces tecum*, the Administrator applied to the United States District Court for an order of enforcement (R. 2-9), under Section 9 of the Federal Trade Commission Act of 1914 (Footnote 2) which reads in part as follows:

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person issue an order requiring such corporation or other person to \* \* \* produce documentary evidence if so ordered. \* \* \*"

This section of the Federal Trade Commission Act was invoked because of Section 9 of the Fair Labor Standards Act (Footnote 3), which reads in part as follows:

"For the purpose of any hearing or investigation provided for in this Act, the provisions of section 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act \* \* \* are hereby made applicable to the jurisdiction, powers, and duties of the Administrator. \* \* \*"

Although the petitioner denied (R. 48) the Administrator's allegation (R. 4) that he had grounds to suspect the petitioner of a violation of law, the District Court refused to require the Administrator to produce any proof that his demand for production of papers was based on any probable cause to suspect that the records demanded contained evidence of a violation of law, or on any probable

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Footnote 2: 38 Stat. 722, 15 U. S. C. 49.

Footnote 3: 52 Stat. 1065, U. S. C. 209.

cause to suspect that a violation of law had occurred as to which the records demanded might be relevant (R. 159). The District Court ordered obedience to the subpoena without taking any evidence (R. 226-229).

The District Court was affirmed in its position by the Circuit Court of Appeals, which held that the Administrator had the right to compel the subsection of the records of an employer of labor to what the Administrator characterized as "routine" inspections, and that such inspections could be ordered:

" \* \* \* regardless of whether there is any pre-existing probable cause for believing that there has been a violation of the law." (R. 257).

#### **Opinions of the Courts Below:**

The opinion (R. 246) of the Circuit Court of Appeals is not yet reported. The opinion of the District Court (R. 215) is reported at 30 Fed. Supp. 360.

#### **Grounds on Which Jurisdiction of This Court Is Invoked:**

##### **a. Basis for jurisdiction of this Court.**

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 *Stats.* 938 (28 *U. S. C.* Secs. 347 (a) ).

##### **b. The Statutes Involved.**

The case originated in the United States District Court under Section 9 of the Federal Trade Commission Act, (Act of Sept. 26, 1914, c. 311, Section 9, 38 *Stat.* 722; 15 *U. S. C.* Sec. 49) associated by reference to the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, Sections 1-19, 52 *Stat.* 1060-1069; 29 *U. S. C.* Sections 201-219) by Section 9 of the Fair Labor Standards Act (Act

of June 25, 1938, c. 676, Section 9, 52 *Stat.* 1065, 29 *U. S. C.* Section 209, Sections 9 and 10 of the Federal Trade Commission Act and the entire Fair Labor Standards Act of 1938 are set out in the appendix.

**c. Date of the Order to be Reviewed.**

The order of the Circuit Court of Appeals affirming the order of the District Court was entered July 17, 1940. This petition for Writ of Certiorari and supporting transcript of record are filed in this Court within three months from July 17, 1940, on SEP 9 1940

**Questions Presented.**

1. Do Sections 9 and 10 of the Federal Trade Commission Act as made applicable to the powers of the Administrator of the Wage and Hour Division by Section 9 of the Fair Labor Standards Act authorize the Administrator, in the course of routine inspections made to police the Act, to compel production for his inspection of all records and papers of an employer in interstate commerce containing information as to wages paid to, hours worked by, and hours scheduled to be worked by, the employees of such employer?
2. May the Congress, under the Fourth Amendment, validly grant power to a law enforcement officer to compel the production of the private records of an interstate mercantile business, in connection with routine inspections made to secure enforcement of a law without requiring the law enforcement officer to show that he has probable cause for suspecting that such records contain evidence of a violation of the law sought to be enforced?
3. Has the Administrator of the Wage and Hour Division, in the course of his performance of the duty of

policing the Fair Labor Standards Act, the power to compel the production of any records of an employer in the absence of a showing that such records relate to matters covered by the Act or to hours worked by, or wages paid to, employees covered by the Act?

**Reasons Relied on for the Allowance of the Writ.**

1. In holding that the Administrator of the Wage and Hour Division of the Department of Labor, in connection with his duty to police the Fair Labor Standards Act, has the statutory right to inspect at will all the records kept by an employer in interstate commerce which contain wage and hour information, the Circuit Court of Appeals has decided a question of Federal law of importance both to the Administrator in his enforcement of the Fair Labor Standards Act and the thousands of employers subject to it in the conduct of their businesses.

2. In interpreting Section 9 of the Federal Trade Commission Act as authorizing the enforcement of a subpoena *duces tecum* in the absence of any showing that the papers and records covered contained "evidence" material to a specific offense reasonably suspected, the Circuit Court of Appeals has interpreted the section in a manner conflicting with the interpretation given it by this Court and by other courts in *Fed. Tr. Com. v. American Tobacco Co.*, 264 U. S. 298, in *Fed. Tr. Com. v. Baltimore Grain Co.* (D.C., Md.), 284 Fed. 886 (affirmed by memorandum, 267 U. S. 586), in *Fed. Tr. Com. v. Claire Furnace Co.*, 274 U. S. 160, in *Fed. Tr. Com. v. Maynard Coal Co.* (C. of A., D. of C.), 32 Fed. (2d) 873, and in *Fed. Tr. Com. v. Smith* (D. C. S. D., N. Y.), 34 Fed. (2d) 323.

3. In failing to read into the applicable statute the requirement of the Fourth Amendment that probable

cause for the issuance of the writ be shown, the Circuit Court of Appeals has rendered a decision in conflict with *Schencks v. U. S.* (C. of A., D. of C.), 2 Fed. (2d) 185, *Wagner v. U. S.* (8th Cir.), 8 Fed. (2d) 581, and *Woods v. U. S.*, (4th Cir.), 279 Fed. 706.

4. In holding that the Fourth Amendment does not prohibit a grant of power to a law enforcement officer to compel the production of the private records of a merchandising business in connection with a routine inspection, the Circuit Court of Appeals has decided an important point of Federal Constitutional law in a manner which conflicts with prior decisions of this and other Courts, including *Fed. Tr. Com. v. American Tobacco Co.*, 264 U. S. 298, *Garske v. U. S.* (8th Cir.), 1 Fed. (2d) 621, *U. S. v. Lefkowitz*, 285 U. S. 452, and *Gouled v. U. S.*, 255 U. S. 298.

5. In holding that the records of any business which so affects the national public interest in interstate commerce as to be subject to regulation under the commerce clause thereby cease to be private papers and become public property outside the protection of the Fourth Amendment, the Circuit Court of Appeals has decided a point of Federal Constitutional law in a manner which conflicts with the prior decision of this Court in *Fed. Tr. Com. v. American Tobacco Co.*, 264 U. S. 298.

6. In holding that a law enforcement officer may compel the production of the private records of a business without showing that they relate to the subject matter of the law which he seeks to enforce or to activities within the commerce clause, the Circuit Court of Appeals has rendered a decision in conflict with the prior decisions of this Court in *Fed. Tr. Com. v. American Tobacco Co.*, 264 U. S. 298 and *Fed. Tr. Com. v. Claire Furnace Co.*, 274 U. S. 160.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court a full and complete transcript of the record and of the proceedings before it in the case numbered and entitled on its docket Number 7213, "Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner-Appellee, vs. Montgomery Ward & Co., Incorporated, Respondent-Appellant", to the end that the judgment herein of that court may be reviewed and reversed by this Court.

MONTGOMERY WARD & Co., INCORPORATED  
*Petitioner,*

By STUART S. BALL,  
*Counsel for Petitioner.*

